TANAH SUTERA DEVELOPMENT SDN BHD

v.

PENTADBIR TANAH DAERAH JOHOR BAHRU

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
KC VOHRAH JCA
[CIVIL APPEAL NO: J-01-44-1997]
15 JANUARY 2002

CIVIL PROCEDURE: *Appeal - Transfer of - Court of Appeal to Federal Court - Jurisdiction and power - Whether Court of Appeal has jurisdiction to hear appeal - Whether Court of Appeal can transfer appeal to Federal Court - Courts of Judicature Act 1964, 1st Schedule, para 12 - Rules of the Court of Appeal 1994, r. 76 - Rules of the High Court 1980, O. 92 r. 4*

The issue before the Court of Appeal was whether it could transfer this appeal and all other appeals pertaining to an identical point to the Federal Court for hearing and disposal. The respondent raised the objection that as this court had no jurisdiction to hear the appeal, it followed that it had no jurisdiction to make an order of transfer.

Held:
Per Gopal Sri Ram JCA

[1] The fact that this court had no jurisdiction to hear the appeal was settled by the decision of the Federal Court in *Batu Kawan Berhad v. Pentadbir Tanah Daerah Seberang Perai Selatan.* (p 18 d)

[2] On the issue of transfer, it was sufficient to refer to three provisions. The first provision was para 12 of the Schedule to the Courts of Judicature Act 1964 which confers on the High Court power to transfer proceedings from itself to another court. The phrase "any other Court" in the said paragraph must, in the present context, be read generously and purposively. The second provision was r. 76 of the Rules of the Court of Appeal 1994. When read with para 12 of the Schedule to the Courts of Judicature Act 1964 vests in the court the power to transfer any case to another court, which in the present context, must refer to the Federal Court. Finally, there was O. 92 r. 4 of the Rules of the High Court 1980 which declares the inherent jurisdiction exercisable by the High Court. That this rule of court has jurisdictional effect and is of wide import is settled by the court in *Motor Emporium v.*

Arumugam. Such jurisdiction is equally exercisable by this court in consequence of r. 76 to which reference has already been made. The only postulate for the exercise of that jurisdiction is the interests of justice. (pp 18 e-i & 19 a-h)

[3] In the present case, the interest of justice was clearly in favour of effecting a transfer. If the court did not order a transfer, the appellant would have to apply to the Federal Court for an extension of time to lodge an appeal to that court. Such an extension may or may not be granted, as it is a matter of discretion. If time is granted, then a fresh notice and record of appeal will have to be lodged. The costs incurred by the appellant in bringing the appeal before the court would be wasted. As there are several hundreds of these cases, the justice of the case clearly laid in ordering the transfer. It followed, therefore, that the court had the requisite jurisdiction and power to order a transfer. (pp 19 h-i & 20 a-b)

[This appeal and all other 96 appeals to be transferred to the Federal Court.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Isu dihadapan Mahkamah Rayuan adalah samada ia boleh memindahkan rayuan ini dan rayuan-rayuan yang lain berkenaan perkara yang sama kepada Mahkamah Persekutuan untuk pendengaran dan pelupusan kes. Pihak responden telah membangkitkan bantahan bahawa memandangkan mahkamah ini tiada bidangkuasa untuk mendengar rayuan ini seterusnya ia juga tiada bidangkuasa untuk membuat perintah bagi pemindahan rayuan.

Diputuskan:
Oleh Gopal Sri Ram JCA

[1] Fakta bahawa mahkamah ini tiada bidangkuasa untuk mendengar rayuan ini telah diputuskan oleh Mahkamah Persekutuan dalam *Batu Kawan Berhad v. Pentadbir Tanah Daerah Seberang Perai Selatan*.

[2] Mengenai isu pemindahan rayuan, adalah memadai untuk merujuk kepada tiga peruntukan. Peruntukan pertama adalah dalam perenggan 12 Jadual kepada Akta Mahkamah Kehakiman 1964 yang menganugerahkan kuasa kepada Mahkamah Tinggi untuk memindahkan prosiding ke mahkamah yang lain. Ungkapan "any other court" dalam perenggan tersebut mestilah dibaca mengikut konteks masakini dengan secara meluas dan bermatlamat. Peruntukan kedua adalah dalam k. 76 Kaedah-kaedah Mahkamah Rayuan 1994. Apabila dibaca bersama perenggan 12 Jadual kepada Akta Mahkamah Kehakiman 1964, ianya memberikan kuasa kepada mahkamah untuk memindahkan sebarang kes ke mahkamah yang lain, dimana dalam konteks masakini mestilah merujuk kepada Mahkamah Persekutuan.

Seterusnya terdapat A. 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 yang mengisytiharkan bidangkuasa sedia ada yang boleh dilaksanakan oleh Mahkamah Tinggi. Peraturan mahkamah ini mempunyai kesan terhadap bidangkuasa perundangan dan mempunyai kepentingan yang luas sepertimana yang telah diputuskan dalam *Motor Emporium v. Arumugam*. Bidangkuasa perundangan ini boleh dilaksanakan oleh mahkamah ini akibat k. 76 yang telah dinyatakan diatas. Walaubagaimana pun pelaksanaan bidangkuasa tersebut hanyalah semata-mata untuk kepentingan keadilan sahaja.

[3] Dalam kes ini, kepentingan keadilan adalah secara jelasnya menyokong kepada pemindahan rayuan. Sekiranya mahkamah tidak membenarkan pemindahan rayuan itu, pihak perayu terpaksa membuat satu permohonan kepada Mahkamah Persekutuan untuk perlanjutan masa bagi memfailkan rayuan. Lanjutan masa dibenarkan atau tidak adalah terletak atas budibicara mahkamah. Sekiranya lanjutan masa dibenarkan, notis rayuan dan rekod rayuan yang baru perlulah difailkan. Dengan demikian kos yang ditanggung oleh pihak responden dalam membawa rayuan ini di mahkamah menjadi sia-sia. Memandangkan terdapat ratusan kes yang sebegini, keadilan kes adalah dengan memerintahkan pemindahan rayuan. Dengan demikian adalah diputuskan bahawa mahkamah mempunyai bidangkuasa yang diperlukan dan kuasa untuk memerintahkan satu pemindahan rayuan.

[Rayuan ini dan 96 rayuan lain akan dipindahkan ke Mahkamah Persekutuan.]

Case(s) referred to:

Batu Kawan Bhd v. Pentadbir Tanah Daerah Seberang Perai Selatan [2002] 1 CLJ 633 ***(refd)***
Chief Kofi Forfie v. Barima Kwabena Seifah [1958] All ER 289 ***(refd)***
Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***
Motor Emporium v. Arumugam [1933] MLJ 276 ***(refd)***
Pepper (Inspector of Taxes) v. Hart [1993] AC 593 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, Schedule, para 12
Interpretation Acts 1948 & 1967, s. 17A
Rules of the Court of Appeal 1994, r. 76
Rules of the High Court 1980, O. 92 r. 4
Civil Procedure Code 1918, s. 151

For the appellant - Azlan Sulaiman; M/s Allen Gledhill
For the respondent - Iskandar Ali Dewa SFC

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA

There are almost one hundred appeals before us this morning. They all pertain to an identical point. It is whether we have jurisdiction to transfer all these appeals to the Federal Court for hearing and disposal. The respondent in this present case has taken an objection on the ground that this court has no jurisdiction to transfer the appellant's appeal to the Federal Court. He says that this is because we have no jurisdiction to hear the appeal and so it follows that we have no jurisdiction to make the order of transfer.

Although learned Senior Federal Counsel for the respondent was unable to cite any authority in support of that proposition, we think that there is a stream, albeit a slender stream, of authority flowing in the opposite direction. In *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1, Thompson CJ, when dealing with the expressions 'jurisdiction' and 'power' appearing in the Courts Ordinance 1948 said:

> The Third Schedule, on the other hand is headed 'Additional Powers of the Courts' and except in Items 22 and 26, which only relates to the appellate jurisdiction of the High Court, the word 'jurisdiction' does not occur anywhere in it. Each item, on the other hand, apart from those mentioned, begins with the words 'A Court may'.
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> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its power.
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> The same distinction between jurisdiction and powers is to be observed in section 46 which deals with criminal matters. The first subsection sets out by reference to the First Schedule to the Ordinance, which is of the same sort of structure as the Second Schedule, the original criminal jurisdiction of the Court whereas it is the second sub-section which gives it the power when exercising that jurisdiction to pass any sentence allowed by law.
>
> It is to be observed in passing that a similar distinction is to be found in the Judicature Act, 1925 (and was to be found in the Act of 1873). Certain sections (e.g. 18, 20 and 21) relate in terms to the jurisdiction of the High Court. Others (e.g. 39 and 46) provide that the Court 'shall have power'.

> The view that in the Ordinance jurisdiction is not synonymous with powers gains strength when the Ordinance is considered in the light of the 1948 Agreement.

Lee Lee Cheng was a case in which an attempt was made to extend the time limited for bringing an action in a running-down claim. Counsel for plaintiff relied on a paragraph in the Third Schedule to the Courts Ordinance which conferred jurisdiction on a court to extend or abridge time. It is in this context that the Court of Appeal of Malaya, affirming the judgment of Syed Sheh Barakbah J (as he then was), held that whilst there might be **jurisdiction** to extend time the particular statute, namely the Civil Law Ordinance 1956, did not confer upon the court the **power** to extend time.

In the present instance, the question is whether this court has jurisdiction to transfer a case which it has no jurisdiction to hear and dispose of. That we have no jurisdiction to hear the appeal is, at least for the moment, settled by the decision of the Federal Court in *Batu Kawan Berhad v. Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 1 CLJ 633. Does that mean that we have no jurisdiction to transfer this case to the Federal Court which is the court vested with the necessary jurisdiction? We think not.

So far as written law is concerned it is sufficient for us to refer to three provisions. The first is para. 12 of the Schedule to the Courts of Judicature Act 1964 which confers on the High Court power to transfer proceedings from itself to another court. It reads as follows:

> 12. Power to transfer any proceedings to any other court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

In our judgment, the phrase "any other court" must in the present context be read generously and purposively. See, *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593, per Lord Griffith at p. 617. Indeed that is the will of Parliament as expressed in s. 17A of the Interpretation Acts 1948 & 1967 (Act 388) (Consolidated and Revised 1989). That section reads:

> S. 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The second provision that is relevant for present purposes is r. 76 of the Rules of the Court of Appeal 1994 which reads as follows:

> 76. The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

This rule, when read with para. 12 of the Schedule to the Courts of Judicature Act 1964, vests in us the power to transfer any case to another court, which, in the present context, must refer to the Federal Court.

Finally, there is RHC, O. 92 r. 4, which declares the inherent jurisdiction exercisable by the High Court. It reads as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

That this rule of court has jurisdictional effect and is of wide import is settled by the judgment of Terrel Ag. CJ in *Motor Emporium v. Arumugam* [1933] MLJ 276, p. 278. The learned acting Chief Justice, when dealing with s. 151 of the Civil Procedure Code (Cap 7) of Malaya, the precursor to O. 92 r. 4 said that the provision:

> has the widest possible **jurisdiction** in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered.

Such jurisdiction is equally exercisable by this court in consequence of r. 76 to which reference has already been made. The only postulate for the exercise of that jurisdiction is the interests of justice. So far as the present instance is concerned, we think that the interests of justice lie clearly in favour of effecting a transfer. There is the decision of the Federal Court that says that we lack jurisdiction to hear this appeal. It binds us. Consider then as to what will happen if we do not order a transfer. It would mean that the instant appellant would have to apply to the Federal Court for an extension of time to lodge an appeal to that court. Such extension may or may not be granted, as it is a matter of discretion. If

time is granted, then a fresh notice and record of appeal will have to be lodged. The costs incurred by the appellant in bringing the appeal before us will be wasted. Now, multiply that several hundred times – there are several hundreds of these cases – and you will see at once where the justice of the case lies.

So it comes to this. We have the requisite jurisdiction and the power to order a transfer. These are the two conditions set by *Lee Lee Cheng (supra)* and they are satisfied. So the transfer may be made.

We may add we also derive support from the decision of the Privy Council in *Chief Kofi Forfie v. Barima Kwabena Seifah* [1958] All ER 289. Although it is a case that is only noted, the judgment of the Board delivered by Mr. L.M.D. De Silva is particularly instructive. We would quote the following passage from the advice:

> Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29 that could be made was that, on a question of procedure, he attributed the authority to do the things he did to source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the things he had done.

By analogy, if we have no jurisdiction to hear this appeal, we nevertheless have jurisdiction to transfer this appeal to a court which has jurisdiction to hear and dispose of it; in this instance the Federal Court.

For the reasons already given the objection as to jurisdiction fails. Nevertheless it would not be quite out of place to express our gratitude to Encik Iskandar Ali bin Dewa, senior federal counsel who has taken pains to raise the point in the interests of justice. But for his intervention, all these cases would have had to be dealt with *sub silentio* on the point of jurisdiction.

For convenience, this appeal and all the other 96 appeals will be dealt with by the order that we now propose to make.